

## Criminal Lawyer

2008

### Case Comment

#### The meaning of 'wrong' in the M'Naghten test

Lisa Cherkassky\*

**Keywords:** Insanity, M'Naghten rules, knowledge, morally wrong, wounding with intent, mens rea

A rare issue arose in the recent case of *R v Johnson (Dean)* [2007] EWCA Crim 1978, in which a generally undisturbed area of the *M'Naghten* rules came under close scrutiny. When applying the notorious *M'Naghten* tests in order to plea the defence of insanity, is the assailant required to know that his act was legally wrong or merely morally wrong in order to succeed?

#### The facts in Johnson.

In June 2006 the Johnson forced his way into T's flat with a large kitchen knife and stabbed T several times. J was suffering from delusions and clear auditory hallucinations. Both psychiatrists at his trial were agreed that he was suffering from a disease of the mind at the time of his act and that he knew the nature and quality of his act. However, one psychiatrist was of the opinion that the J did not know that his act was morally wrong. The Recorder, having reviewed the previous case law in the area, concluded that the defence of insanity was not open to the defendant because he knew that his act was against the law. J was convicted of wounding with intent to do grievous bodily harm and shortly before sentencing he was made subject to a hospital order without limit of time under sections 37 and 41 of the Mental Health Act 1983. The issue for the Court of Appeal was whether, under the M'Naghten rules, 'wrong' meant legally wrong or morally wrong.

#### General Principles.

Lord Justice Latham - presiding in the Court of Appeal in Johnson - submitted that the rules relating to the defence of Insanity should be 'approached with some caution' (at [14]). A lack of case authority combined with the origin of the rules has made the defence of insanity notoriously difficult to interpret and apply. But to make matters even more difficult for the Lords in *Johnson*, so rare was the issue at the heart of this case that only a vague handful of English authorities were available for the Lords to scrutinise the test in any detail.

The *M'Naghten Case* (1843) 10 Cl. & F. 200 established the well-known test for the defence of insanity which was voiced in the words of Tindal C.J. in the House of Lords:

‘at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong’ (at p.210). When weighing up the difference between ‘right and wrong’ in regards to the latter part of the test, Tindal C.J. provided that ‘if upon balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, he is then a responsible agent...’ (at p.925). It is clear from the inclusion of the phrase ‘...to the act of which he stands charged...’ that Tindal C.J. was implying that the assailant possesses an understanding of his *legal* wrong as opposed to his moral culpability. It is this part of the test which came under consideration in *Johnson*, but has been the subject of little historical deliberation in the Courts.

Tindal C.J.’s ‘legally wrong’ principle was first re-iterated in the significant English authority of *Codere* (1917) 12 Cr.App.R. 21. The appellant brutally murdered a man by causing significant head injuries and slashing his throat to his spine. The Court of Appeal were of the opinion that when incorporating the phrase ‘nature and quality’ into the M’Naghten rules, the House of Lords in *M’Naghten* were only concerned with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act. That was the law as it had been laid down in previous cases and Lord Reading C.J. in *Codere* was unwilling at that point to divert from the law (at p.27). A discussion as to the meaning of ‘wrong’ did emerge in *Codere* - albeit briefly - and Lord Reading C.J. submitted that the standard to apply was the standard of the reasonable man, by stating: ‘...it would probably be sufficient to render him punishable, if he knew—that is, understood and appreciated—that the act would be condemned and regarded as wrong by his fellow-creatures.’ (p25). This was taken to mean ‘legally wrong’ by the later case of *R v Rivett* (1950) 34 Cr.App.R. 87, in which the appellant strangled a girl with her scarf and contended that he was suffering from schizophrenia at the time of the attack. Two juries had found the appellant fit to stand trial and the third convicted him of murder and R was sentenced to death. The true meaning of ‘wrong’ was not discussed in *Rivett*, but rather significantly Lord Goddard C.J. in the Court of Appeal submitted that as well as harboring a disease of the mind, the assailant must have a lack of responsibility for his actions (p 94). Lord Goddard C.J. also dismissed Rivett’s appeal by stating that not only must the appellant have a disease of the mind, but that defect must be such as to render the appellant ‘not responsible for his actions’ (i.e. he must be able to distinguish from right or wrong).

In the significant authority of *R v Windle* [1952] 2 Q.B. 826, Lord Goddard C.J. had another opportunity to declare that *Rivett* had laid down ‘the real test’, which was one of ‘responsibility’. W gave his wife 100 aspirins, knowing that she was suicidal and mentally unstable. She took them and died. The appellant informed the police of his action and said ‘I suppose they will hang me for this?’ A doctor for the appellant at trial stated that if a person was in constant attendance on another of unsound mind, in some way the insanity might be communicated to the attendant, so that the attendant might develop a defect of reason or of mind. It was however ruled that there was no scope for the defense of insanity and the appellant was convicted of murder. Lord Goddard C.J. in the Court of Appeal dismissed the appellants’ action, submitting at pages 832-4 that:

*‘...the appellant knew, when administering this poison, for such it was, to his wife, that he was doing an act which the law forbade. As I endeavored to point out in Rex v. Rivett, the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is "wrong," and by "wrong" is meant contrary to law, he is responsible. It would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. In the opinion of the court there is no doubt that in the McNaghten rules "wrong" means contrary to law and not "wrong" according to the opinion of one man or of a number of people on the question whether a particular Act might or might not be justified.’*

Lord Goddard’s submission in *Windle* - that at the time of a criminal act the insane assailant must not know that his act was legally wrong - was not disputed by Lord Latham in the present case of *Johnson*, who went on to agree that Lord Goddard’s view was in fact ‘settled law’ and it was inappropriate for the Court of Appeal to reconsider the rules of insanity at the time of the *Johnson* case (at [23] and [24]). There is, however, reasons highlighted in the *Johnson* judgment to suggest that *Windle* may not be all correct. Lord Justice Latham in *Johnson* recites the *M’Naghten* test from Blackstone’s Criminal Practice at paragraph 18: ‘it is suggested that the key to a proper understanding of this question is to recognise that the question is a negative one. If the accused *does* know *either* that his act is *morally* wrong *or* that it is *legally* wrong then it cannot be said that he does not know he was doing what was wrong’. This view throws weight behind the proposition that if an insane assailant was aware that his act was merely morally wrong, he satisfies the latter part of the *M’Naghten* test. Similarly, Lord Justice Latham draws attention to the Australian authority of *R v Stapleton* (1952) 86 C.L.R. 358 which refused to follow *Windle* after embarking on a detailed examination of the English law both before and after *M’Naghten*. The High Court of Australia appeared to be of the view that if an assailant believed his act to be right according to the ordinary standard of the reasonable man, he was entitled to use the defence of insanity even if he knew it to be legally wrong (see Smith and Hogan on Criminal Law). This reasoning may open the scope of the law to beyond what is desirable, and in the end Lord Justice Latham was of the opinion that the terms in *Windle* were clear and correct.

*Johnson* was given leave to appeal, but the Court of Appeal made it clear that this area of law had plenty of room for reconsideration.

### **The outcome of Johnson.**

As the product of a discussion in the House of Lords as opposed to a Parliamentary statute or a Judicial Committee, it is clear that the defence of insanity rests on unsatisfactory grounds. Perhaps by admitting in *Johnson* that the defence of insanity left great room for reconsideration and debate, the Court of Appeal provided a hint that the rules surrounding this defence were not too far entrenched in the law to avoid radical judicial scrutiny in the not-to-distant future. It is certainly desirable that the House of Lords re-visit the fact that sleepwalkers (*R v Burgess* [1991] 2 All ER 769), diabetics (*R v Hennessey* [1989] 1 W.L.R. 287) and epileptics (*R v Sullivan* [1984] A.C. 156) are labelled ‘insane’ in today’s legal arena, but perhaps such a drastic and far-reaching change should be left to Parliament.

\*Lisa Cherkassky LLB, PGCE(PCE), LLM  
Lecturer in Law  
The University of Bradford  
Emm Lane  
Bradford  
West Yorkshire  
BD9 4JL